In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1095

MARION G. DENTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the Court of Claims' refusal to overturn the rulling of the Undersecretary of the Air Force that the relief accorded petitioner for a wrongful discharge as an Air Force reservist should include placement in the same position he would have occupied had no error been made, *i.e.*, dating his corrected release as of the post-World War II period of demobilization, rather than the date of the correction.

1. On August 19, 1944, petitioner, then a major in the Army Air Corps Reserve, was released from active duty following conviction by a general court-martial for failure to carry out a lawful order of a superior officer. In 1953 he requested the Air Force Board for Correction of Military Records to vacate the sentence of the general court-martial. In May 1954 the Board denied the application (Pet. App. 1a-2a).

In 1963 petitioner filed a second application to vacate his court-martial sentence (Pet. App. 2a). On March 19, 1964, the Assistant Secretary of the Air Force directed that the sentence be set aside and, in addition, that petitioner's military record be corrected to show that he was released from active duty, "due to demobilization" following World War II, on September 2, 1945, the effective date of the general demobilization (*ibid.*).

On November 30, 1965, petitioner filed a new application seeking amendment of the 1964 order to show that he was separated from active duty after September 2, 1945, on an unspecified date prior to April 1, 1953, when he was promoted to the rank of Colonel in the Air Force Reserve, and that he was promoted to Brigadier General in 1956 (*ibid.*). On October 4, 1966, the Undersecretary of the Air Force corrected petitioner's record to show that his active duty continued to December 2, 1945 (due to allowance of 90 days terminal leave beyond the initial September 2 date), and to show that in 1953 he was promoted to Colonel and that he retired in 1956 with entitlement to retired pay (*id.* at 3a-4a). In April 1967, petitioner received $42,511.57 as payment for sums due him as a result of these corrections to his record. Since October 1966, he has been receiving monthly retirement checks (*id.* at 4a).

On August 17, 1972, petitioner filed this action in the Court of Claims alleging that the Undersecretary's 1966 order was "arbitrary and capricious" and contrary to law because "neither the Correction Board nor the Secretary of the Air Force has the power to backdate a reserve officer's release from active duty" (Pet. App. 5a). Petitioner contended that the date of his discharge from active duty should have been March 19, 1964, when his court-martial sentence was set aside by the Correction Board, and that he should receive active duty pay until that date (*ibid.*).

The Court of Claims dismissed petitioner's complaint. The court held that petitioner's action was precluded by 28 U.S.C. 2501, which bars any claim filed in the Court of Claims "unless the petition thereon is filed within six years after such claim first accrues" (Pet. App. 5a-9a). The court also held that the Undersecretary, acting through the Correction Board, had authority to take any reasonable action calculated to put the serviceman in the same position he would have occupied had an error not been made, and that the backdating of petitioner's release to the post-World War II period of demobilization was reasonable and not an abuse of his discretion (*id.* at 9a-12a). The court noted that petitioner himself had requested the Board to backdate its correction of his records and that he had not claimed that his discharge from active duty should be shown as occurring at the time of the 1964 correction of his records (*id.* at 8a-9a).

2. The decision of the Court of Claims is correct and does not conflict with decisions of other courts, so that review by this Court is unwarranted.

a. The action was barred by the six-year statute of limitations. Even if petitioner's claim did not accrue when the Correction Board first acted on his claim in May 1954, the gist of petitioner's complaint is that his release was erroneously backdated to September 2, 1945, a determination first made in the Undersecretary's order of March 19, 1964. Accordingly, petitioner's claim in the present action "first accrued" no later than that order[1] and the six-year period of lim-

[1]The March 19, 1964, order was final and was not "reopened" by the November 30, 1965, application. The Court of Claims has held that a request for reconsideration must be filed within a short period following the Correction Board's decision in order to suspend finality. *E.g.*, *Dayley* v. *United States*, 169 Ct. Cl. 305,

itations ended on March 19, 1970, more than two years before this action was begun.

b. The Court of Claims decision was also correct on the merits. The controlling statute, 10 U.S.C. 1552,[2] grants to the Secretary of a military department, acting through Correction Boards, the authority to correct records "when he considers it necessary to correct an error or remove an injustice." The Court of Claims has consistently held that the statute grants the Secretary broad discretion to take any action reasonably calculated to put a wrongfully discharged serviceman in the same position he would have occupied had an error not been made. *Kimmel* v. *United States*, 196 Ct. Cl. 579, 591. As the court below stated (Pet. App. 10a):

> Many factors, such as the needs of the armed services and the characteristics of the particular individual involved, can affect the date on which a serviceman would have been discharged had an improper discharge never occurred. In a case such as the

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309; *Biddle* v. *United States*, 186 Ct. Cl. 87, 98. Moreover, as the court below properly noted: "We see no reason why proceedings initiated by an application for entirely new relief, which could have been requested prior to an earlier favorable decision, should deprive the earlier decision, which granted all the relief requested, of finality" (Pet. App. 7a). Finally, the court correctly concluded that petitioner "may not base his cause of action on the 1966 decision since "the claim he asserted during the 1965-1966 proceedings was very different from his claim here that the Correction Board's lack of power to backdate his discharge entitles him to active duty pay for the period from September 2, 1945, until March 19, 1964" (Pet. App. 8a-9a).

[2]Section 1552(a) provides in pertinent part that

> [t]he Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct error or remove an injustice.

> one at the bar where the original discharge is not invalidated until many years after it occurred, such factors certainly might indicate that the complainant would have been discharged prior to the invalidation date.

The court below specifically found that the Undersecretary acted reasonably and well within his broad discretion in determining that petitioner would probably have been discharged on September 2, 1945, the effective date of the general demobilization following World War II. At that time petitioner would have been a reserve officer in his forties, employed in a nonrated capacity as a technical inspector (1966 Board Tr. 36). As the court below stated, this was "a time when many reserve officers were released from active duty because they were no longer needed" (Pet. App. 11a), and there is no reason to believe that an exception would have been made for petitioner.[3]

Moreover, contrary to petitioner's assertion (Pet. 8), the court's ruling was in accord with prior decisions of the Court of Claims. For example, in *Merriott* v. *United States*, 163 Ct. Cl. 261, 264, certiorari denied, 379 U.S. 838, the court similarly held that although a reservist's release in 1945 was unlawful, the 1945 release date did

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[3]As a reserve officer, petitioner had no vested right to remain on active duty, since a Secretary of a military department may (with certain exceptions not here relevant) release a Reserve officer under his jurisdiction from active duty "at any time." 10 U.S.C. 681(a).

not require correction because it "came too close to the end of World War II for the court to speculate that, unlike millions of other reservists, he would have been kept on active duty."[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[4]The case petitioner cites for the proposition that the backdating of discharges is unlawful (*Egan* v. *United States*, 141 Ct. Cl. 1, 15-19) was distinguished in *Merriott*, where the court stated (163 Ct. Cl. at 265):

> In *Egan*, the officer was illegally and erroneously released to inactive duty in October 1943, and then illegally discharged from the Marine Corps Reserve in April 1944, on the ground that he was insane (which he was not); if the true facts had been known it would have been highly unlikely that a healthy Marine Corps combat officer would have been released in the very midst of World War II; in fact, no reason for such a release at that time appeared in the record * * *.

Petitioner's case is quite different.